No. 78-171

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSE L. FERNANDEZ-GUZMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EDWARD J. CALIHAN, JR.
ANNA R. LAVIN
53 West Jackson Boulevard
Chicago, Illinois 60604
Attorneys for Petitioner
JOSE L. FERNANDEZ-GUZMAN

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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To: *The Honorable, The Chief Justice and Assacoiate Justices of the Supreme Court of the United States.*

Petitioner, Jose L. Fernandez-Guzman, prays that a writ of certiorari issue to review the opinions of the United States Court of Appeals for the Seventh Circuit entered in this cause.

OPINIONS OF THE COURTS BELOW

Three opinions issued in this cause. That of the United States District Court denying the Motion made to suppress evidence was filed on December 6, 1976, is not reported, but

is printed in the Appendix (App. A. pp. App. 1-2). The United States Court of Appeals, on May 23, 1978, handed down two separate opinions, one to be published, the other ordered not to be published. Neither is yet reported, but each is printed in the Appendix, and are identified respectively as App. B. pp. App. 3-15 (the Opinion to be published), and App. C pp. App. 16-27 (the Opinion not to be published).

JURISDICTION

The above-described Opinions of the United States Court of Appeals were filed on May 23, 1978 (App. B & C, pp. App. 3-27). A Petition for Rehearing and Suggestion for Rehearing En Banc timely made was denied on June 30, 1978. This Petition is filed within thirty days of that date. The jurisdiction of this Court is invoked under Title 28, U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Court of Appeals holding the amendment to Rule 5(a), effective October, 1972, which mandated, in post-arrest complaints, compliance with Rule 4(a) so far as a showing of probable cause is required, is without significance? Whether a failure to show probable cause in such complaint is to be considered a mere clerical deficiency despite the amendment to the Rule?

2. Whether this decision of first impression, negating any substantive purposes or effect in its observance, or, as here, non-observance, should be reviewed by this Court, or stand as the sole precedent of the amendment's non-efficaciousness?

3. Whether the failure of this Court in drafting, and the failure of the Congress in approving the amendment to the Rule, to articulate sanctions for non-observance

warrants the amendment being treated differently than non-observance of Rule 4(a), even though the latter Rule neither set forth suppression as the consequence.

4. Whether the brazen factual mis-statements in the Rule 5(a) complaints here can be rewarded by the expedient of calling them negligent, when they are clearly criminally reckless at the least, or, realistically, consciously false?

5. Whether—disregarding the amendment to Rule 5(a) as importing any effective requirement imposed on the arresting constable to justify the arrest made, and the search incident thereto, as this decision of the Court of Appeals does—the finding of probable cause on evidence, later given in court in blatant self-conflict with the complaints, is consistent with this Court's rulings in similar cases?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV, Constitution of the United States

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Title 18 U.S.C. § 3771

> The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or

finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, and in proceedings before United States magistrates. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Rule 5(a) Federal Rules of Criminal Procedure, 18 U.S.C.A.

(a) In General. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before the magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

Rule 4(a), Federal Rules of Criminal Procedure, 18 U.S.C.A.

(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

STATEMENT OF THE CASE

This case was begun by the filing of a Complaint against this defendant (and another against his co-defendant[1]) on August 13, 1976. Thereafter an indictment was filed, on September 16, 1976, charging that they, on or about July 12 and 13, 1976, did knowingly and intentionally possess with intent to distribute a large amount of heroin in violation of Title 21, U.S.C. §841(a)(1). Doc. 1)[2]

On October 18, 1976, the defendants filed a Motion to Suppress Evidence as being obtained in violation of the Fourth and Fifth Amendments to the Constitution of the United States. (Doc. 5) Attached to said Motion as Exhibits were the complaints filed against the two named defendants by respectively Special Agent Irwin of the D.E.A.,

[1] The co-defendant, Jose Rodriquez, was acquitted after trial on the merits.

[2] In this petition: "App. ....." refers to Appendix attached hereto; "Doc. ....." refers to Common Law record; "A" refers to transcript of proceedings.

and Officer Maurice Dailey of the Chicago Police Department. There was, as well, filed as an exhibit, photographs supplied by the government, depicting a certain shopping or grocery bag referred to in said complaints. (Exhibit C) A Memorandum of Law in support of said Motion was simultaneously filed (attached to Document 5).

On November 1, 1976, the government filed its Response to Defendants' Motion to Suppress (Doc. 7), which in no way countered the claimed insufficiency of the complaints, but pointed out that the arrests were warrantless and the search, whether before or after the arrests, were incident to the warrantless arrests or were warrantless searches themselves; that the complaints were complaints made after the arrests under the provisions of Rule 5 of the Federal Rules of Criminal Procedure, and were not conclusive on what constituted probable cause. The Government claimed that, as warrantless arrests and warrantless searches, the government was entitled to go beyond those matters stated in the Rule 5 complaints in order to demonstrate probable cause. (Doc. 7)

On December 6, 1976, the Trial Court handed down its Memorandum Opinion (App. A) holding:

> "Defendants, claiming that the search was unlawful inasmuch as the arrest was unlawful, having been made without probable cause, have moved to suppress evidence concerning the contents of the brown paper bag. The government, on the other hand, contends that there was in fact probable cause for arrest, so that the search was valid, and asks for a hearing on the issue. Defendants seek to resist such a hearing asserting that the sum of total of facts known to the arresting officers at the time of the arrest, which must provide the basis for their belief that probable cause for arrest existed, must be considered to have been included in the complaint signed by the arresting officers after the arrest pursuant to Rule 5(a) of the Federal Rules of Criminal Procedure, and that to allow the government to now show at a hearing that the arresting officers had additional facts within their knowledge at the time of the arrest would be improper. We cannot agree." (App. A, pp. App. 1-2)

The Court then distinguished between complaints made before arrest pursuant to Rule 4 and those made after arrest as follows:

> "The complaint that a police officer presents to a magistrate *before* arresting someone, that is, in order to obtain an arrest warrant, is the basis for the magistrate's judgment that probable cause exists; therefore, since it embodies the sum total of facts that the magistrate is aware of when he makes his determination, it is properly only to the complaint that a court must look when it reviews that determination. In the case of an arrest made without a warrant, on the other hand, it is the facts known to the arresting officer, and not to the magistrate, that form the basis for a determination that there exists probable cause, and it is the arresting officer, not the magistrate, who makes that determination. The complaint required to be filed by Federal Criminal Procedure Rule 5(a) is necessarily a statement made after the event, and there is no reason that it should be considered the sole source of evidence as to what facts and circumstances were known to the police officer at the time of the arrest.
>
> "Confident of its ability to sort out hindsight observations made now from relation of facts known in the past, the court hereby orders that the motion to suppress be continued for hearing prior to trial." (App. A. p. App. 3)

Thereafter, on February 15, 1977, an evidentiary hearing was had on the motion to suppress. (Doc. 16) At such

hearing the defendants offered into evidence the complaints, and the government offered its witnesses (Transcript of February 15, 1977).

On that same day the Motion to Suppress was denied, (Doc. 16), and the case set down for trial on the merits. On July 22, 1977, the cause was called on for trial by the Court, sitting without a jury, a jury having been waived, (Doc. 24-25); a stipulation of facts was entered into (Doc. 26) the only significant thing about which was that the substance seized, and which was sought to be suppressed, was actually a controlled substance, to wit, a heroin derivative, and that the car from which it was seized was registered to Jose Rodriquez (co-defendant, later acquitted).

On July 28, 1977, after the taking of evidence, the motion to suppress was again raised and again denied; Jose Rodriquez' motion for judgment of acquittal was granted, and the motion of this Petitioner, Jose Luis Fernandez-Guzman, for judgment of acquittal was denied. (Doc. 28) A judgment of guilty as to this Petitioner was thereupon entered (Doc. 29), and on September 14, 1977, he was ordered committed to the custody of the Attorney General for a period of five years, and in addition to which a special parole term of three years was imposed.

On review, the Court of Appeals found the issues raised to be:

> "* * * (1) that the 5(a) complaints do not show probable cause; (2) that if those complaints are sufficient on their face, inaccuracies within them invalidate them; (3) that if holding an evidentiary hearing on the suppression motion was not error, the evidence adduced at it was insufficient to support probable cause to arrest; and (4) that the evidence at trial was not sufficient to convict." (App. C, pp. App. 16-17)[3]

[3] We do not belabor the fourth issue on this Petition.

The Court of Appeals affirmed, finding that the two complaints of the police officer and of the Drug Enforcement Agent "fail to show probable cause to arrest, even taking the allegedly inaccurate statements at face value." (App. B, p. App. 6)

It found the Rule (5(a)) did not mandate suppression on deficient complaints, and that the arrest, search and, ultimately, the conviction were supportable on the basis of the in-court testimony.

Acknowledging the complaints met neither tine of the two-pronged *Aguilar* test (*Aguilar* v. *State of Texas*, 378 U.S. 108, 114), the Court of Appeals found the required reliability from the testimony that the DEA Agent Irwin[4] had received information from the informant on fifty occasions within the prior 2 years which Irwin considered accurate though it led to no arrests nor narcotics seizures (App. C. p. App. 20). According to the in-court testimony, Irwin had been told "reliably" that Rodriquez had several vehicles; one of Rodriquez's cars was used by Mancillas[5]; Mancillas was *trafficing* in drugs in Cleveland, and in Detroit, the Tangiers Hotel was a meeting place of Mancillas and Rodriquez (App. C, p. App. 21). While recognizing that none of this information concerned this petitioner, the Court of Appeals determined the informant's reliability was thus established (App. C, p. App. 21). From this was added for sufficiency purposes that "Irwin [DEA agent] was not unjustified in considering the information received

[4] In the affidavits, the Chicago Police officer purported to have received informant information, not the DEA agent.

[5] A stranger to this proceeding.

about the defendant and the July 12 drug deal to be reasonably trustworthy and part of the totality of facts and circumstances surrounding his arrest." The resume continues:

> "* * * That information revealed by Irwin's informant was the following: Fernandez was trafficking in drugs for Mancillas; Fernandez used to frequent the Maribou, a club owned by Mancillas, and had displayed a large amount of money there just before July 12; a large quantity of heroin was in Chicago for Mancillas on July 12 and Rodriguez was to be active in its distribution. Although there was no evidence on how the informant came to know this information, later corroboration implies it must have been obtained through reliable means.
>
> "With the confidential advice as background, Irwin and Dailey became aware of additional facts and circumstances through surveillance conducted by themselves and other agents during the month prior to and on the night of July 12. Prior to that date, Fernandez was seen frequenting Rodriguez's South Keeler residence, and spending the night several times. Then on July 12, the following activities were observed: Fernandez came out of the Keeler house about 9:00 P.M., looked up and down the street, walked over to and drove away a black Cadillac. After circling the block a few times, he drove to the alley at the rear of the house he had exited, where Rodriguez, carrying a grocery-type brown paper bag with red writing on it, also came out. Rodriguez looked up and down before entering the Cadillac. The two men proceeded, again circuitously, to a corner of West Pierce and Homan where they parked and got out of the car, Rodriguez still with the bag. They looked up and down the street before entering an apartment at 3501 West Pierce. About a half hour later, they both came out without the bag and returned to 2724 South Keeler. Around 11:30 P.M., both men again exited the Keeler address.

> Fernandez then drove a red Mustang and Rodriguez, a 1975 Burgundy Ford Elite, both cars registered to Rodriguez, to the same apartment on West Pierce. Neither carried anything. No one had entered or exited the building since they had left it earlier. After being in the apartment about a half hour, Fernandez came out the same door he had entered, stopped halfway to the parked Mustang and looked around. He was at this time carrying a brown bag which looked the same as the one Rodriguez had brought there earlier. He then entered the car. Rodriguez immediately thereafter came from the backyard at 3501 West Pierce, also stopping on the way to his car to look around. He was carrying a large metal box which Irwin recognized from his experience in drug enforcement to be a scale box, commonly used in the weighing of narcotics. Rodriguez then got into the Ford Elite. The men drove away in different directions. (Soon after this they were stopped and arrested. The bag, found to contain heroin, was seized from Fernandez, and the scale box was seized from Rodriguez.)" (App. C, pp. App. 22-23)

The foregoing, conviction was affirmed on the 23rd of May, 1978, as aforesaid.

REASONS FOR GRANTING THE WRIT

We pray this Court issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the decisions herein for the following reasons:

1. This is the first interpretation of Rule 5(a), as amended in 1972. The Seventh Circuit deemed the instant interpretation to be of "precedential significance" in the area of implementation of Fourth Amendment rights.[6] It is the only decision of a federal review-court extant and patently "strips Rule 5(a) of some meaning"[7]. Of intrinsic Constitutional impact, this decision presents a question that has not been but should be decided by this Court.

Rule 5(a) was amended, operative in October, 1972, to add the portions emphasized below:

> "(a) . . . If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith *which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause.* (Emphasis added.)" (App. B, pp. App. 7)

[6] App. B, p. App. 6.

[7] "Finally, while we affirm the decision reached by the district court, we are not unresponsive to the defendant's charge that this result strips Rule 5(a) of some meaning. We remind federal law enforcers that the rule was amended in 1972 in spite of objections which we understand were made by the Justice Department that the amendment would create an additional and unnecessary administrative burden upon the criminal justice system. If filing 5(a) complaints which show probable cause is in fact burdensome, it must nevertheless be done, and performed with both care and accuracy. * * *" (App. B, p. App. 15)

To give the amendment any substance, it must be given meaning. Prior thereto a complaint had also to be filed with, or information otherwise given, the magistrate to justify detention. The Rule now provides the constable many continue with his warrantless arrest, but that, whereas before he only had to justify it under questioning, he must forthwith detail the incidents that led him to consider the arrest was justified and submit them to the review of the Magistrate to determine whether his belief meets legal standards.

This he is allowed to do without undue hurry, but still avoiding the "familiar shortcomings of hindsight judgment." (*Beck* v. *Ohio,* 379 U.S. at page 96) It is concluded that the rule was inaugurated to eradicate those "familiar shortcomings". The reasoning provoking the amendment to the Rule was whole-heartedly endorsed by the Seventh Circuit as a measure designed "to minimize the risks attendant upon hindsight justification of governbent action." (App. B, p. App. 9)

It is of basic and immediate importance to note that this is not an instance of the constable, armed with a warrant, making an arrest while personally observing the commission of a crime[8], nor of one who has personal knowledge extraneous to the observations, or knowledge of another, on whose complaint the warrant issued.[9] We are here dealing with post-arrest complaints drawn with the legal purpose of justifying the earlier arrest, and the search already made incident thereto. These are complaints drawn hours after the arrest and search, with the

[8] See *United States* v. *Rabinowitz,* 339 U.S. 56, 60; *United States* v. *Morris,* 477 F.2d 657 (5th Cir., 1973).

[9] See *United States* v. *Watson,* 423 U.S. 411; *United States* v. *Morris,* 477 F.2d 657 (5th Cir., 1973); *United States* v. *White,* 342 F.2d 379 (4th Cir., 1965).

assistance of the Assistant United States Attorney. Notwithstanding that these complainants were the same persons who effected the warrantless arrest, the Court of Appeals drawing on cases presuming just such circumstances as we outlined before (the present commission of crime or the arresting officer other than the complainant)[10] determined:

> "* * * If there is no constitutional reason for imposing a four-corner rule in the 4(a) warrant situation, there is even less reason for doing so in the 5(a) warrantless situation where an arrest occurs *before* and thus, could in no way be affected by a possibly deficient 5(a) complaint." (App. B, p. App. 12)

Notwithstanding the clear wording of the amendment, the Court of Appeals has determined that a failure to articulate a basis for a finding of probable cause in a Rule 5(a) complaint does not have the same results and incidents as the same failure in respect of a Rule 4(a) complaint. (App. B, p. App. 11)

2. The decision of the Court of Appeals for the Seventh Circuit is one at complete variance with applicable decisions of this Court.

Even the government agreed, in its written arguments and briefs below that there is no "apparent reason to conclude that a different standard should be applied to an arrest under a Rule 5 warrant, issued after the arrest, as opposed to a Rule 4 warrant issued prior to the arrest."

Despite this concession, the Court of Appeals inherently disagrees. It states the proposition as follows:

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[10] This same application of inapplicable authorities bottoms the rationale of the Court of Appeals in its denial of suppression (App. B, p. App. 12).

> "* * * However, the defendant goes on to argue that if a 5(a) complaint is subsequently found to be deficient—facially or subfacially—then any evidence seized incident to the arrest must be suppressed, either because the arrest itself is deemed to have been been unconstitutional, or because the purposes of the 1972 amendment to Rule 5(a) require that result. * * *" (App. B, pp. App. 7-8)

In answer to this contention, the Court of Appeals nonetheless restricted relief to sheer argumentation utility:

> "Although the risks due to hindsight are high whenever the government seeks to validate an arrest well after it was made, the existence of a deficient warrant or 5(a) complaint helps mitigate those risks. Either may be used by the defense to impeach the credibility of the affiants or as a basis for arguing that they could not have had the information they claim at a suppression hearing to have had prior to the arrest or they surely would have included it in their earlier sworn document." (App. B, p. App. 12)

The basis for this conclusion is a failure of this Court in framing, and the legislature in [illegible] the criminal rules to spell out any intended sanction.

> "* * * However, not only is the procedural rule silent as to enforcement and remedy, but we have been unable to locate any legislative or judicial history supporting his position." (App. "B" p. App. 13)

> " * * * We think it unwise to read in the exclusionary rule as an additional incentive to promote compliance with Rule 5(a)'s complaint requirement without some affirmative language to that effect in the Rule itself." (App. "B" p. App. 15)

We submit these parts of the decision do not comport with earlier decisions of this Court in interpretation of the rules. In not too dissimilar context, the government has

before urged that a Rule 4 complaint need not show probable cause; that a bare outline comparable to an incident under Rule 7(c) of the Federal Rules of Criminal Procedure should suffice, because, after all, that is all that a defendant would have been advised had indictment proceeded rather than succeeded arrest. In other words, the determination of the existence of probable cause could be left to a later date and for another finder of probable cause. This Court said:

> "Indeed, if this complaint were upheld, the substantive requirements would be completely read out of Rule 4, and the complaint would be of only formal significance, entitled to perfunctory approval by the Commissioner. This would not comport with the protective purposes which a complaint is designed to achieve." *Giordenello* v. *United States,* 357 U.S. 480 at 487.

Similarly when 26 U.S.C. §6531 was considered in respect of its extending the statute of limitations for a period of nine months after the filing of a complaint before a Commissioner of the United States, again this Court rejected any suggestion that the filing of a complaint was pro forma. *Jaben* v. *United States,* 381 U.S. 214, 218-9. Since such procedures under Rule 4 are necessary to the issuance of a summons or the effectuation of an arrest, certainly nothing less can be required under Rule 5 to validate an arrest already made. Declining to accept the government's view that *any* complaint would activate the 9-month grace period, this Court held in *Jaben* at page 220:

> "The better view of §6531 is that the complaint, to initiate the time extension, must be adequate to begin effectively the criminal process prescribed by the Federal Criminal Rules. It must be sufficient to justify the next steps in the process—those of notifying the defendant and bringing him before the Commissioner for a preliminary hearing."

Since a deficient complaint does not serve to extend a statute of limitations—even though by the return of an indictment probable cause did, in fact, exist—we are unable to reconcile the Court of Appeal's holding that a secret, but unexpressed, probable cause, extends to validate the arrest.

The basis of the Court of Appeals decision that, although concededly the Rule 5(a) complaints were inadequate, and inferentially that its decision "strips Rule 5(a) of some meaning", yet this Court, and the Congress did not decree by the Rule that suppression would ensue from its non-observance, is antagonistic to the results that follow when Rule 4(a) is violated, and those results follow even though Rule 4(a) does not, in itself, direct those results. Such an inconsistency does not comport with reason, and is particularly confounding when we consider Rule 5(a) was amended to include the mandate that complaints drawn and filed thereunder "shall comply with the requirements of Rule 4(a) with respect to a showing of probable cause."

The opinion of the Court of Appeals contends we ask that this Court's holding in *Gerstein* v. *Pugh,* 420 U.S. 103 (App. B, pp. App. 9-10) be exceeded. We do not see it. We believe, in fact, that the rationale of *Gerstein* is rebuffed by this decision. While the collection of evidence seized incident to an unauthorized arrest or detention was not involved in *Gerstein* v. *Pugh,* 420 U.S. 103, this Court speaks obliquely to the question:

> "We reiterated this principle in United States v. United States District Court, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). In terms that apply equally to arrests, we described the 'very heart of the Fourth Amendment directive' as a requirement that 'where practical, a governmental search and seizure should represent both the efforts of the officer to gather

> evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation.' *Id.* at 316, 92 S.Ct. at 2136." 420 U.S. at p. 113, fn. 12

Further, in *Gerstein*, this Court, in such part as can be related here, found the reappraisal of what the constable knew, as opposed to what he said he knew, of no consequence:

> "Under this practical compromise, a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate." *Gerstein* v. *Pugh*, 420 U.S. 103, 113-14.

It was not pursuant to the "in-court" justification that the evidence here was seized, but pursuant to the purported justification given the Magistrate for the earlier warrantless arrest. Were we to assume that the *preferred* procedure had been feasible, and a warrant for arrest and *search* had issued on the grounds put into the complaint, and that such warrant had improperly issued on the insubstantial complaints here, it seems irrefutable that the evidence seized would be suppressed, and the facts, suspicions and imaginations locked in the heart of the complainant could not have later validated it. It is incomprehensible that the lesser-preferred procedure is here found more advantageous to law enforcers. If the complaints, obviously insufficient, had been conscientiously reviewed, no excuse exists for the search, and the seizure is proscribed as violative of the basic protection of the Fourth Amendment guaranteeing security in a person's effects.

None of the authorities on which the Court of Appeals relied to come to its justification of this decision (App. B, p. App. 12) serves to accomplish that justification.[11]

Giordenello v. *United States*, 357 U.S. 480, presents a case of complexity, but actually not applicable to this action. Giordenello was arrested, and searched incident to arrest, for an offense other than the one for which he was indicted. The search incident revealed the possession of the narcotics for which he was ultimately charged. The arrest warrant was determined invalid for want of adequate factual support. Nor was *any* complaint filed with the Commissioner for the different offense on which he was tried "as would have been required by Rule 5(a) F.R.Crim. Proc., had he been arrested therefore. . . ." (See *Giordenello* v. *United States*, 241 F.2d 575, 583, J. Rives dissenting) The arrest, therefore, could not be justified under federal law. The Supreme Court agreed with the dissent, *Giordenello* v. *United States*, 357 U.S. 480.[12]

Neither can this arrest and search be justified under federal law.

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[11] Some of these authorities are distinguished under footnotes 8 and 9 *infra*. Further, we omit discussion of *United States* v. *Fachini*, 466 F.2d 53 (6th Cir., 1972) because two courts found probable cause in that complaint.

[12] On an argument the majority of this Court considered was raised too late, the Government proposed the arrest was justified under Texas state law. The Supreme Court, while holding the federal arrest invalid, gave the government an opportunity to return to the trial court to see if the arrest could be reconciled to the state's requirements for arrest by a peace officer or presumably a private citizen. Any justification under the requirements of Illinois law—if there are—has not been suggested here.

United States v. *Rose*, 541 F.2d 750 (8th Cir. 1976), does not aid in resolving the question. The case does not concern an inadequate complaint under the Rule 5(a) requirements. It seems generally assumed, in fact, that the earlier federal complaint was eminently satisfactory to all concerned (541 F.2d at p. 753). The problem arose when the government, for very practical reasons determined it would not present evidence on the Rule 5(c) hearing Rose demanded, knowing such refusal would mandate his release under Rule 5.1(a) and (b). The problem arose when the State issued a faulty warrant, (but not one governed by federal procedural rules), to effect State arrest upon the instant of Rose's federal release. Without committing itself on the issue of federal-state connivance, the Eighth Circuit considered the State arrest a continuation of federal custody without the hearing demanded by federal law. *But* it allowed use of the confession made by Rose during that continuation on its ultimate finding that:

> "* * * There is nothing to indicate that the defendant was influenced to confess by the fact that he was in state custody, and it is clear that his confession was voluntary and was made after he had been advised fully as to his rights." (541 F.2d at p. 758)

No such voluntariness can be found here in the seizure of the evidence, though we agree with the Eighth Circuit that it indeed had a "close case". But not one of application here.

In *United States* v. *Hall*, 348 F.2d 837 (2nd Cir. 1965), on which the Court below also relies—except for that evidence admitted without objection and voluntarily made available by defendant for reasons other than his arrest (348 F.2d at 843)—no other evidence was offered. See 348 F.2d at p. 840, fn. 3. Moreover, ours is not a philosophical complaint as in *Hall*. We ask for no damages because petitioner was illegally restrained of his liberty, because probable cause was not shown. Such relief would amount only to a pyrrhic censure. We complain of the evidence seized and used at trial to secure conviction.

We have no disagreement with the Court of Appeals on the basic proposition that an arrest warrant is not constitutionally mandated (App. B, p. App. 8). We think, however, that Court's continuation that such is the rule "even when there was opportunity for one to be obtained" is a bit extravagant. The permissible excuses for arresting without obtaining warrants are severely delineated by this Court in *Cooledge* v. *New Hampshire*, 403 U.S. 443, 454-5. The validity of that delineation persists.

Singularly, this Court in the *Watson* (*United States* v. *Watson*, 423 U.S. 411) case, upon which the Court of Appeals fairly heavily relies, made the following statement:

> "The effect of the judgment of the Court of Appeals was to invalidate the statute as applied in this case and as applied in all situations where the Court fails to find exigent circumstances justifying a warrantless arrest."

Conversely, where this Court refused to allow the lower *Watson* decision to stand because it effectively invalidated the statute, this case frankly admits that the result reached by it "strips Rule 5(a) of some meaning." (App. B, p. App. 15) The *Watson* Court detailed the many statutes authorizing federal law enforcement officers to make arrests on probable cause without warrant, none of them having to do with exigency (423 U.S. at 416), and combining that with the strong presumption of constitutionality of an Act of Congress, plus no direct prohibition under the Fourth Amendment against warrantless arrests, endorsed the warrantless arrests and in so doing, affirmed the validity of

the statute. It is inconsistent that, on the basis of *Watson* reliance, another Act of Congress is disaffirmed.

Conceding the availability of warrantless arrests, and the now presence of the amended Rule 5(a), that Rule having been enacted to preserve the integrity of the Fourth Amendment, it cannot be said, as the decisions here do, that the Fourth Amendment didn't need it. There is a basic constitutionality built into Rule 5(a), just as there is a basic presumption of constitutionality involved in the statutes involved in *Watson*. Taking the rationale of *Watson*, with the presence of the congressional mandate in Rule 5(a), which indicates, in effect, the Congress direction to the constable to justify warrantless arrests at the earliest practicable time, the result attained by the Court of Appeals must be in conflict with *Watson*.

While recognizing the existence of the Amendment, the Court of Appeals has ruled in the absence of a congressional mandate, it will not impose such a harsh sanction as suppression of evidence for violation of the Rule. We submit this does not comport with the development of the law under this Court's decisions. As far back as *Weeks* v. *United States*, in 1914, it was determined that Federal Courts were bound to suppress any evidence illegally secured. *Wolf* v. *Colorado*, 338 U.S. 25, in 1949, admitted the restraint upon federal courts but held that it didn't apply to state courts. In the dissenting opinion of Mr. Justice Murphy, we see the first uneasiness about the non-suppression rule as applied to the states. Mr. Justice Murphy weighed the alternatives to suppression, such as civil actions for trespass and after careful analysis of the practical result of such an action concluded that aside from suppression, the "alternatives are deceptive" and that in fact "there is no sanction at all". It was in *Mapp* v. *Ohio*, 1961,

367 U.S. 643 that the Supreme Court came to the determination that no other deterrent was effective. Mr. Justice Black recognized that the Fourth Amendment did not mandate the outlawing of evidence, but in his appreciation of the Fifth Amendment said that evidence seized not in accordance with law constituted a violation of the Fifth Amendment though perpetrated through the machinations of the Fourth.

This decision of the Court of Appeals would revert to where we were back before 1914 when this Court recognized that suppression was not necessarily imposed upon the states—though in its exercise of supervisory power did impose it upon federal courts as being beneath dignity to use evidence so wrongly obtained. In that case it clearly recognized that Congress had not mandated such a result. In *Mapp*, this Court recognized that in the effective enforcement of the Fourth Amendment, courts of the several states should not be besmirched by the use of evidence illegally secured, which doctrine was imposed upon the courts of the United States almost 50 years before. Thus a half century of careful evolution has been negated by the fact that Congress has not done in regard to Rule 5(a) that which it never did in regard to violations of the Fourth Amendment, and illegal warrants under Rule 4(a).

The Court of Appeals recognizes the obvious purpose of Rule 5(a). It even articulates the purpose when it refers to the high "risk due to hindsight". (Op. 77-1954 "A", p. 8) The panel satisfies itself that those "high risks" are mitigated by Rule 5(a), in that the 5(a) complaint may be used for *impeachment*. Given the bad odor of the charge against petitioner, again, we have the deceptive alternative in which inheres "no sanction at all." (Justice Murphy dissenting in *Wolf* v. *Colorado*, supra).

3. In its supervisory capacity, this Court should refuse to tolerate as mere carelessness the audacious misrepresentations made in the Rule 5(a) complaints, and allow, at the least, criminal recklessness on the part of the affiants to go uncensured. The decision is a direct inconsistency with this Court's recent decision in Franks v. Delaware, No. 77-5176 (23 Cr. L. 3163), June 28, 1978.

In the unpublished decision below (App. C, p. App. 19), the Court of Appeals eschewed discussion of factual difference between the sworn complaints and the facts to which those same complainants testified at the suppression hearing and on trial stating:

> *"II. INACCURACIES IN THE COMPLAINTS*
>
> Since the 5(a) complaints are deficient on their face, there is no need to consider whether some of the statements contained in them are inaccurate or false. Whatever inaccuracies there are do not substantiate bad faith on the part of the affiants sufficient to trigger use of the exclusionary rule. The most that has been demonstrated here is carelessness not deliberate false swearing.[1]
>
> "However, as recognized by this court in *United States* v. *Carmichael*, 489 F.2d 983, 990 (7th Cir. 1973), as well as by the district judge and the defendant himself in this case, inaccurate complaints or affidavits do serve an important function for impeachment purposes when the affiants testify differently at a later hearing. In this case, that was the only function of the 5(a) complaints.

"[1] In *United States* v. *Carmichael*, 489 F.2d 983 (7th Cir. 1973), this court stated that misrepresentations in a pre-arrest affidavit made deliberately to deceive the warrant-issuing magistrate require use of the exclusionary rule whether or not the inaccuracies are material to the showing of probable cause. We also said that if the errors were recklessly, but not intentionally, made, then the exclusionary rule applies only if those errors were material to the probable cause showing. However, in no event did we deem it necessary to exclude evidence based on merely negligent errors in the arrest warrant."

This Court is in the same position on review of the record, as the Court of Appeals for the Seventh Circuit to determine if such gross misstatements can be dismissed as mere careless or negligent errors.

We have, therefore, reproduced the contents of the Rule 5(a) complaints below, italicizing the portions personally contradicted by each affiant himself on hearing or trial:

OFFICER DAILEY

"1. Complainant is an investigator with the Chicago Police Department.

"2. *On July 12, 1976, complainant was informed by a confidential source that a shipment of heroin was expected on or about July 12, 1976, and that the defendant [Fernandez] would be involved in delivering the heroin to the smaller distributors. The informant, on July 12, 1976, further informed complainant that the shipment had arrived and was at 2724 South Keeler, Chicago, Illinois.*

"3. At approximately 9:30 P.M., on July 12, 1976, complainant observed an individual leave the residence at 2724 South Keeler, Chicago, Illinois, carrying a brown paper bag with a red square and writing on it.

"4. Complainant followed the individual. He proceeded by car to 3501 West Pierce, Chicago, Illinois. At that address, the individual with the bag parked and went into the first floor apartment of the building at that address. A few minutes later, he came out of the apartment without the bag, reentered his car, and drove back to 2724 South Keeler.

"5. Complainant maintained surveillance of 3501 West Pierce. No one entered or left the first floor apartment until approximately 11:50 P.M., when the same individual arrived accompanied by Jose L. Fernandez-Guzman and went into the apartment.

"Shortly thereafter, the individual and Fernandez came out of the apartment. Fernandez was carrying a bag that appeared identical to the one carried into the apartment by the other individual.

"6. At that time, Fernandez was stopped and the bag was examined. It contained several plastic bags containing a brown powdery substance which appeared to be heroin. Fernandez was then placed under arrest.

"7. A field test of the substance seized from Fernandez revealed that it contained heroin. Preliminary weighing indicates the substance seized weighs approximately five pounds."

AGENT IRWIN

"1. Complainant is a Special Agent of the Drug Enforcement Administration.

"2. *At approximately 9:30 P.M., on July 12, 1976, complainant observed Rodriquez leave his residence at 2724 South Keeler, Chicago, Illinois, carrying a brown paper bag with a red square and writing.*

"3. Complainant followed Rodriquez.[13] Rodriquez proceeded by car to 3501 West Pierce, Chicago, Illinois. At that address, Rodriquez parked and went into the first floor apartment of the building at that address. A few minutes later, Rodriquez came out of the apartment without the bag, re-entered his car, *and drove back to 2724 South Keeler.*

"4. Complainant maintained surveillance of 3501 West Pierce. No one entered or left the first floor apartment until approximately 11:50 P.M., when Rodriquez arrived accompanied by Jose L. Fernandez-Guzman and went into the apartment. Shortly thereafter, Rodriquez and Fernandez came out of the apartment. Fernandez was carrying a bag that appeared identical to the one carried into the apartment by Rodriquez earlier that evening.

[13] Co-defendant acquitted on trial.

"5. *At that time, based on information that Fernandez would be at that location with a quantity of heroin to be delivered,* Fernandez was placed under arrest. The bag was examined. It contained several plastic bags containing a brown powdery substance which appeared to be heroin.

"6. Rodriquez was then placed under arrest. *He has admitted that he delivered the heroin.*

"7. A field test of the substance seized from Fernandez revealed that it contained heroin."

We are not concerned here with a mere failure to amplify facts stated,[14] but rather we are concerned with irreconcilable sworn self-contradictions by the deponents. The Court of Appeals even recognized the dangers inherent in lending judicial support to such abuses designed to provoke the issuance of process.[15] But imposed "no sanction at all."

[14] The Seventh Circuit's analysis that "the omission of some of those facts from later-filed 5(a) complaints cannot make the arrest retroactively unconstitutional" (App. B, pp. App. 12-13) cannot itself stand under analysis when juxtaposed with the record. It is impossible to conceive under what criterion it could, any more than this Court can, determine truth. The lower court gave the conflicts no greater dignity than prior contradictory statements. Compare the treatment the Congress accords citizens in similar circumstances under Title 18 U.S.C. §1632.

[15] Similarly, this Court has decided that "evidence seized incident to an arrest made upon a warrant must be suppressed if it is shown that the affiant intentionally misrepresented certain facts in order to deceive the warrant issuing magistrate, whether or not those facts were material to the warrant showing of probable cause. *United States* v. *Carmichael,* 489 F.2d 983 (7th Cir. 1973). We reached this result because of our belief that intentional false swearing by law enforcement officers to bolster a probable cause showing presents such an egregious threat to Fourth Amendment rights that it deserves the strongest deterrent available." (App. "B" pp. App. 14-15)

In *Franks* v. *Delaware,* No. 77-5176, June 28, 1978 (reported at 23 Cr.L. 3179), this Court authorized striking from consideration the details of the affidavit later contradicted or impeached, leaving the remainder to demonstrate, if it could, probable cause. This case is a complete volte-face of that opinion. It accepts as primary to justify arrest and incidental search, the testimony which would have impeached, and treats merely as impeaching the complaints, which, under *Franks,* would have been primary.

The factual similarities to *Franks* are unquestionable. Here, too, the Court is faced with "the question of the affiant's integrity as to his own activities" (23 Cr.L. at 3183). The purpose to be achieved in both instances should also be the same:

> "The requirement that a warrant not issue 'but upon probable cause, supported by Oath or affirmation,' would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and having misled the magistrate, then was able to remain confident that the ploy was worthwhile." (23 Cr.L. at 3183).

Franks presents the only reasonably effective procedure to eliminate benediction and repetition of the noisome behavior presented here.

This case presents one affiant, who said he had an informant but did not. Another, who had no informant, but says on hearing that he had the informant the first attested to, and reasonably believed in his integrity. Careless?

"Carelessness" here cannot be accepted as excuse by the most amenable of minds, and without going into redundant detail, it must be remembered here that these complaints were filled out in the presence and with the assistance of an Assistant United States Attorney. The contradictions were legion. They cannot be swept aside as "carelessness not deliberate false swearing", where the drug enforcement agency special agent stated in his sworn complaint that "Rodriquez was then placed under arrest and he admitted he delivered the heroin." At Pages 186-188 of the transcript, he admitted no such admission was made. No Court can conceivably reconcile such a statement as being merely careless.

4. Whatever this Court decides as to the function intended in amending Rule 5(a), the Court of Appeals finding of probable cause irrespective of the sworn post-arrest complaints filed directly conflicts with this Court's standards.

In the context of avoiding repetition, we will briefly analyze the facts as endorsed by the Court of Appeals and set out at pp. App. 4-15 hereof.

With the full understanding that everything so detailed is a complete stranger to the 5(a) complaint except to-wit: "Rodriquez [an acquitted companion of Fernandez] was to be active in its [heroin] distribution", and "Fernandez used to frequent the Maribou, a club owned by Mancillas, and had displayed a large amount of money there just before July 12; . . . ."[16] we nonetheless invite the Court to review that evidence, that stands as a basis for the decision of finding probable cause. Before we invite this Court to do that, however, it should be remembered that a quantity of "grocery-type brown paper bags with red lettering" had been accumulated at random by petitioner's at-

[16] It would seem the large amount of money for a person convicted of possession with intent to distribute was placing the cart before the horse, plus the obvious objection that the source of this knowledge by the informant was never revealed.

torneys, and the arresting-attesting constables could not tell one from the other. We invite the Court to put such "facts" in juxtaposition to *Henry* v. *United States*, 361 U.S. 98:

> "It is true that a federal crime had been committed at a terminal in the neighborhood, whisky having been stolen from an interstate shipment. [nothing remotely tantamount to this fact is present in this case] Petitioner's friend, Pierotti, had been suspected of some implication in some interstate shipments, as we have said. But as this record stands, what those shipments were and the manner in which he was implicated remain unexplained and undefined. [Rodriquez had been similarly suspected of implication, and is similarly comparable to Henry's friend Pierotti] The rumor about him is therefore practically meaningless. On the record there was far from enough evidence against him to justify a magistrate in issuing a warrant. So far as the record shows, petitioner had not even been suspected of criminal activity, prior to this time. Riding in the car, stopping in an alley, picking up packages, driving away—these were all acts that were outwardly innocent. Their movements in the car had no mark of fleeing men or men acting furtively. [Looking up and down the street, and taking circuitous routes that were demonstrably not circuitous is the distinction if any] The case might be different if the packages had been taken from the terminal or from an interstate trucking platform. But they were not. As we have said, the alley where the packages were picked up was in a residential section.
>
> "The fact that packages have been stolen does not make every man who carries a package subject to arrest nor the package subject to seizure. The police must have reasonable grounds to believe that the particular package carried by the citizen is contraband. Its shape and design might at times be adequate. The weight of it and the manner in which it is carried might at times be enough. [All of these incidents were absent under the clear evidence] But there was nothing to indicate that the cartons here in issue probably contained liquor." *361 U.S. 98, 103-104, bracketed comments, ours.*

Henry and this decision cannot simultaneously stand as standards for weighing probable cause. Nor will this case stand constantly with *Terry* v. *Ohio*, 392 U.S. 1 and *Sibron* v. *New York*, 392 U.S. 40.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully prayed that this Court will issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

ANNA R. LAVIN
EDWARD J. CALIHAN, JR.
Attorneys for Petitioner

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSE AMERICO RODRIQUEZ and
JOSE LUIS FERNANDEZ-GUZMAN,

Defendants.

No. 76 CR 829

MEMORANDUM OPINION AND ORDER

Defendants were arrested without warrants and charged with possession of heroin with intent to distribute. A search incident to the arrest revealed that a brown paper bag carried by one of the defendants contained a substance alleged to be heroin. Defendants, claiming that the search was unlawful inasmuch as the arrest was unlawful, having been made without probable cause, have moved to suppress the evidence concerning the contents of the brown paper bag. The government, on the other hand, contends that there was in fact probable cause for the arrest, so that the search was valid, and asks for a hearing on the issue. Defendants seek to resist such a hearing, asserting that the sum total of facts known to the arresting officers at the time of the arrest, which must provide the basis for their belief that probable cause for arrest existed, must be considered to have been included in the complaint signed by the arresting officers after the arrest pursuant to Rule 5(a) of the Federal Rules of Criminal Procedure, and that to

allow the government to now show at a hearing that the arresting officers had additional facts within their knowledge at the time of the arrest would be improper. We cannot agree.

It is unquestioned that a police officer can make a valid arrest without a prior warrant if, at the moment of the arrest, he has knowledge of facts and circumstances which would be sufficient to warrant a prudent man in believing that the arrested person had committed or was committing an offense. It also unquestioned that any reasonable search made pursuant to such an arrest constitutes a valid search and any contraband found may lawfully be seized.

But defendant would have us hold that any judicial review of the question of whether or not the arresting officers had probable cause for an arrest must be limited to the face of the complaint signed by them after the arrest in the magistrate's office. Defendant argues that to look to other facts as well is tantamount to erecting an after-the-fact justification for the arrest on the basis of hindsight judgment, and cites cases in which it was held that a court must confine itself to information presented in the complaint. cf. *Whitely* v. *Warden,* 401 U.S. 560 (1970); *Jaben* v. *United States,* 381 U.S. 214 (1965); *Aguilar* v. *Texas,* 378 U.S. 560 (1964); *Kar* v. *California,* 374 U.S. 23 (1963); *Giardenello* v. *United States,* 357 U.S. 580 (1958). But all these cases, unlike the case at bar, concerned arrests made with warrants and, even though we must be cautious in relying upon a distinction between arrests made with and without warrants (being mindful of the Supreme Court's remonstrances that to accept a lesser standard for the latter kind would seriously disturb the protections that a warrant is meant to supply) the distinction is appropriate here. This is so because the complaints involved in the

two kinds of arrests under the federal rules serve different purposes. The complaint that a police officer presents to a magistrate *before* arresting someone, that is, in order to obtain an arrest warrant, is the basis for the magistrate's judgment that probable cause exists; therefore, since it embodies the sum total of facts that the magistrate is aware of when he makes his determination, it is properly only to the complaint that a court must look when it reviews that determination. In the case of an arrest made without a warrant, on the other hand, it is the facts known to the arresting officer, and not to the magistrate, that form the basis for a determination that there exists probable cause, and it is the arresting officer, not the magistrate, who makes that determination. The complaint required to be filed by Federal Criminal Procedural Rule 5(a) is necessarily a statement made after the event, and there is no reason that it should be considered the sole source of evidence as to what facts and circumstances were known to the police officer at the time of the arrest.

Confident of its ability to sort out hindsight observations made now from relation of facts known in the past, the court hereby orders that the motion to suppress be continued for hearing prior to trial.

Enter:

/s/ *Frank J. McGarr*
United States District Judge

Dated: December 6, 1976

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 77-1954

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSE L. FERNANDEZ-GUZMAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-Cr-829 — Frank J. McGarr, *Judge.*

ARGUED JANUARY 26, 1978 — DECIDED MAY 23, 1978

Before FAIRCHILD, *Chief Judge,* and PELL and SPRECHER, *Circuit Judges.*

FAIRCHILD, *Chief Judge.* The Defendant, Jose Fernandez, was arrested without a warrant on a public street shortly after midnight July 13, 1976, allegedly on probable cause to believe he was committing a federal drug offense. Incidental[1] to his arrest, a brown paper bag containing

[1] The facts as presented on appeal do not indicate clearly whether the search or the arrest occurred first. However, the parties seem to agree in their respective briefs and the trial judge found that the arrest was effectuated when Fernandez' car was stopped, with the search and seizure following the arrest. We accept this view.

about two kilograms of heroin was seized from the car he had been driving. Since the arrest was made without a warrant, the arresting officers filed complaints[2] at the defendant's initial appearance before the federal magistrate, as required by Rule 5(a) of the Federal Rules of Criminal Procedure. Before trial, Fernandez moved to suppress the heroin, whereupon the district court conducted an evidentiary hearing, over the defendant's objection, on the question of probable cause at the time of arrest. The defendant had argued that the court's inquiry on his motion must be limited to the 5(a) complaints alone. The motion to suppress was denied and Fernandez was subsequently convicted in a trial to the court of possession with intent to distribute heroin, in violation of 21 U.S.C. §841(a)(1). The defendant was released on bond pending appeal.

The defendant makes the following arguments on appeal:

(1) Following a warrantless arrest, the trial court is precluded from holding an evidentiary hearing on the motion to suppress evidence; instead, inquiry into probable cause to arrest must be restricted to the complaints filed after arrest in accordance with Rule 5(a).

(2) The 5(a) complaints filed in this case fail to show probable cause to arrest the defendant and thus, since they are the only matter to be considered in testing the validity of the arrest, the motion to suppress should have been granted.

[2] Two complaints were filed simultaneously, one by Investigator Dailey of the Chicago Police Department against Fernandez; the other by Special Agent Irwin of the Drug Enforcement Administration against Jose Rodriguez, a co-defendant who was subsequently acquitted. The parties have agreed that since the magistrate had both complaints at the same time, it is fair to consider the contents of both in evaluating them under the requirements of Rule 5(a).

(3) Even if the 5(a) complaints are facially sufficient to support the arrest inaccuracies in them, which became apparent at the suppression hearing, render them invalid and thus also the arrest.

(4) If holding an evidentiary hearing on the suppression motion was not error, the evidence adduced at it does not satisfy the probable cause requirement.

(5) The evidence at trial was insufficient to convict the defendant because of lack of proof on the essential elements of knowledge of the contents of the bag seized and intent to distribute the heroin.

We agree that the 5(a) complaints fail to show probable cause to arrest, even taking the allegedly inaccurate statements at face value. However, we affirm the district court's conclusion that the officers did know at the time of the arrest sufficient facts to support a reasonable belief that the defendant was committing a crime, even though they failed to state enough of those facts when drafting the 5(a) complaints after the arrest for the complaints to demonstrate probable cause. Since we further conclude that it was proper for the district court to hear and consider evidence outside the 5(a) complaints on the defendant's motion to suppress, denial of that motion was not error. In addition, we find that the conviction is supported by sufficient evidence on all the elements. Consequently, we affirm.

The only question this opinion addresses is whether the trial court should have limited its inquiry to the 5(a) complaints on the suppression motion. Since our resolution of the other issues is not deemed to be of precedential significance, those issues are decided in an unpublished order filed at the same time as this opinion.

Prior to 1972, Fed. R. Crim. P. 5(a) required a complaint to be filed at the initial appearance of a person arrested without a warrant. This complaint, unlike the one for obtaining a warrant, was generally considered a jurisdictional requirement only, *Byrnes* v. *United States,* 327 F.2d 825, 834 (9th Cir. 1964), *cert. denied* 377 U.S. 970 (1964), *Gaither* v. *United States,* 413 F.2d 1061, 1075-76 (D.C. Cir. 1969), and therefore, did not usually, if ever, show probable cause on its face, in spite of the Supreme Court's admonition that the purpose of procedural rules like 5(a), even before the 1972 amendment, was to require police with reasonable promptness to show legal cause for detaining arrested persons." *McNabb* v. *United States,* 318 U.S. 332, 344 (1943); *Mallory* v. *United States,* 354 U.S. 449, 454 (1957); *see also Gerstein* v. *Pugh,* 420 U.S. 103, 124 n.24 (1975).

Rule 5(a) was amended in 1972 to read in pertinent part:

> (a) . . . If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith *which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause.* (Emphasis added.)

We agree with the defendant that this amendment enlarges, or at least makes explicit, a function of the post-arrest complaint. The rule, as it now reads, clearly permits an arrested person to challenge further custody and the holding to answer on the basis of lack of probable cause shown in the complaint filed after a warrantless arrest. However, the defendant goes on to argue that if a 5(a) complaint is subsequently found to be deficient—facially or subfacially[3]—then any evidence seized incident

[3] *See United States* v. *Carmichael,* 489 F.2d 983 (7th Cir. 1973).

to the arrest must be suppressed, either because the arrest itself is deemed to have been unconstitutional, or because the purposes of the 1972 amendment to Rule 5(a) require that result. We now discuss our reasons for rejecting these alternative positions.

I. CONSTITUTIONALITY OF THE ARREST

The Fourth Amendment stricture against the seizure of persons, *i.e.* arrest, on less than probable cause strikes what has been recognized as a proper balance between the often conflicting interests of government control of crime and individual privacy. *Brinegar* v. *United States,* 338 U.S. 160, 176 (1949). Ideally, of course, a pre-arrest determination of probable cause by a disinterested judicial officer is preferred to that made by a possibly overzealous law enforcement officer "engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U.S. 10, 14 (1948). Arrest warrants, as much as search warrants, obviously serve a preventative function against unconstitutional invasion of privacy by police. Yet in the area of arrests made in a public place, an arrest warrant has never been considered to be constitutionally mandated even when there was opportunity for one to be obtained. *United States* v. *Watson,* 423 U.S. 411 (1976).

Necessarily, post-arrest judicial review of the decision to arrest cannot prevent or negative the intrusion which has already occurred and which may have been unconstitutional. Nevertheless, the Fourth Amendment has consistently been interpreted as being better served by such review, based on standards at least as stringent as those for securing an arrest warrant. *Whiteley* v. *Warden,* 401 U.S. 560 (1971); *Wong Sun* v. *United States,* 371 U.S. 471 (1963); *Beck* v. *Ohio,* 379 U.S. 89 (1964); *Wrightson* v.

United States, 222 F.2d 556 (D.C. Cir. 1955). Aside from its check on police conduct, a primary personal benefit gained by post-arrest review is the prevention of a continuing unconstitutional invasion if the suspect was in fact arrested without probable cause. Thus, obviously, the earlier the review, the better. Early review also helps to minimize the risks attendant upon hindsight justification of government action. *Beck* v. *Ohio, supra.* Accordingly, Rule 5(a) furthers these goals in the federal system by requiring officers to swear out a complaint showing probable cause before a judicial officer "without unnecessary delay" after a warrantless arrest, that is, at the initial appearance.

In *Gerstein* v. *Pugh,* 420 U.S. 103 (1975), the Supreme Court stated that, following a warrantless arrest, the Fourth Amendment demands a prompt judicial determination of probable cause in order to test continued detention before trial.[4] The perspective taken in *Gerstein* is clearly from the post-arrest position. While an arrest and, therefore, a possibly unconstitutional invasion might be a "fait accompli," the Fourth Amendment's protection extends beyond the initial seizure to continuing detention, and post-arrest review serves to prevent continued violation.

While it is often true when probable cause is found to be lacking at a post-arrest determination, the arrest itself is also found to have been made without probable cause,

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[4] Because Rule 5(a) requires the filing of a probable cause complaint at the initial appearance following a warrantless arrest, the *Gerstein* review in the federal system will occur at that time also. However, the Court made clear that the *Gerstein* determination was not constitutionally mandated to coincide with the suspect's first apperance before a judicial officer. *Gerstein,* 420 U.S. at 123-24.

it is not necessarily so. Obviously, if a post-arrest review results in a finding of no probable cause, government detention must end whether or not the arrest was actually valid. But the question of suppression of any evidence seized incident to the arrest remains dependent for constitutional purposes on whether probable cause existed at the time of arrest.

Now the defendant would have us hold that on a motion to suppress evidence made sometime after the initial appearance, the arrest must be deemed unconstitutional and any derivative evidence suppressed if the 5(a) complaints are found to be deficient, without regard to facts and circumstances outside those complaints yet still within the arresting officers' knowledge at the time of arrest. This result would take us well beyond *Gerstein*. *Gerstein* dealt only with the Fourth Amendment's guarantee as regards the individual already in custody. The Court made clear that although a suspect has a right to challenge probable cause for further pretrial confinement, a conviction will not be vacated on the ground that the defendant has been detained pending trial without a determination of probable cause. 420 U.S. at 119. Indeed, the Court emphatically avoided holding that all arrestees have a Fourth Amendment right to a judicial probable cause determination soon after arrest; instead, "it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial." *Id.* at 126 n.26. While the Court found it unnecessary to define precisely what restraints would require that determination, "significant restraint on liberty" was identified as the key. *Id.* Even if we were to decide that Fernandez suffered such restraint—a question we need not consider—an appropriate method for challenging the magistrate's finding or lack thereof prior to conviction would have been a petition for

habeas corpus. But even then, the remedy for deficient 5(a) complaints would have been discharge from custody, not suppression of the heroin seized incident to the arrest. For it remains that if there was in fact probable cause *at the time of arrest*, the arrest was constitutional when made and cannot retroactively be made unconstitutional by a subsequent event, such as a failure to comply with Rule 5(a). *See e.g., United States* v. *Russian*, 192 F. Supp. 183, 186 (D. Conn. 1961).

The defendant tries to bolster his constitutional argument further by insisting that the same four-corner rule which allegedly applies to arrest warrants to protect Fourth Amendment rights should apply to 5(a) post-arrest complaints. The problem with this argument is that it rests upon a false premise. When an arrest warrant is found to be invalid (either on its face or following a subfacial attack), the frequent result is that the arrest itself was invalid, and incidental evidence would be suppressed.

However, the frequent result is clearly not the universal nor automatic one since the government may attempt to justify the arrest in either of two ways. It can do so, first, by showing that the issuing magistrate had more information than was written in the warrant affidavit. *United States* v. *Beasley*, 485 F.2d 60 (10th Cir. 1973), *cert. denied* 416 U.S. 941 (1974); *see also Boyer* v. *Arizona*, 455 F.2d 804 (2nd Cir. 1972) (search warrant was validated seven months after issuance based in part on oral but unrecorded testimony of the affiant before the warrant-issuing magistrate).

Second, the government could try to justify the arrest as though it were warrantless; that is, it could endeavor to prove that the facts and circumstances within the arrest-

ing officer's knowledge at the time of arrest were sufficient to warrant a person of reasonable caution to believe that the defendant was committing a crime. *United States* v. *Carmichael,* 489 F.2d 983, 990 (7th Cir. 1973); *United States* v. *Rose,* 541 F.2d 750, 756 (8th Cir. 1976), *cert. denied* 429 U.S. 908 (1977); *United States* v. *Hall,* 348 F.2d 837, 841-42 (2nd Cir. 1965), *cert. denied* 382 U.S. 910 (1965); *United States* v. *White,* 342 F.2d 379, 381-82 (4th Cir. 1965), *cert. denied* 382 U.S. 871 (1965); *United States* v. *Morris,* 477 F.2d 657, 663 (5th Cir. 1973); *United States* v. *Fachini,* 466 F.2d 53, 56-7 (6th Cir. 1972). And the government is free to justify the arrest as warrantless even if the arresting officer was the same person who swore out the arrest warrant earlier. *Giordenello* v. *United States,* 357 U.S. 480, 488 (in case of a new trial the government could try to justify the arrest without relying on the warrant); *Fachini,* 466 F.2d 53 (6th Cir. 1972). If there is no constitutional reason for imposing a four-corner rule in the 4(a) warrant situation, there is even less reason for doing so in the 5(a) warrantless situation where an arrest occurs *before* and, thus, could in no way be affected by a possibly deficient 5(a) complaint.

Although the risks due to hindsight are high whenever the government seeks to validate an arrest well after it was made, the existence of a deficient warrant or 5(a) complaint helps mitigate those risks. Either may be used by the defense to impeach the credibility of the affiants or as a basis for arguing that they could not have had the information they claim at a suppression hearing to have had prior to the arrest or they surely would have included it in their earlier sworn document.

In sum, when the facts known to the officers at the time of arrest are such as to make the arrest constitutional when it occurred, the omission of some of those facts from later-

filed 5(a) complaints cannot make the arrest retroactively unconstitutional. Thus, unless as a matter of policy the 5(a) complaints should have retroactive effect, the focus of inquiry on the suppression motion was correctly determined by the district court to be the time of arrest, and evidence concerning what was known by the arresting officers then was properly heard on the motion.

II. EXCLUSIONARY RULE NOT REQUIRED BY RULE 5(a)

Besides the constitutional argument which we have rejected, the defendant appears to argue that a policy ground for the result he seeks is suggested by Rule 5(a) itself. However, not only is the procedural rule silent as to enforcement and remedy, but we have been unable to locate any legislative or judicial history supporting his position. The only remedy ever mentioned in connection with the amendment with which we are concerned appeared in the initial 1970 proposal which concluded: "In the absence of a showing of probable cause the magistrate shall discharge the arrested person."[5] Even in this, however, there is no indication that the test for suppression of evidence seized incidentally to the arrest is anything other than the constitutionality of the arrest at the time of arrest.

In addition, committee notes[6] accompanying the 1970 proposal make clear that the intent was to make the warrantless arrest situation conform more closely with the warrant procedure by requiring that a neutral magistrate pass on probable cause as soon as possible after an arrest.

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[5] Proposed Rule 5(d)(1), Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts 11 (1970).

[6] *Id.* at 14.

Like the warrant procedure, then, the purpose in having 5(a) complaints show probable cause is primarily prophylactic: to prevent an initial or continuing unconstitutional invasion of personal privacy. If they should fail in that purpose and both an unconstitutional arrest and detention are made, a full evidentiary hearing on a motion to suppress, for example, will hopefully reveal the error. But if the warrant or complaint should fail only in not showing probable cause when, in fact, probable cause to arrest did exist, the defendant is in no way harmed by the arrest and a suppression hearing will also show that. We do not believe the amenders of Rule 5(a) intended post-arrest complaints to preclude the taking of additional evidence on the probable cause issue when it is raised in the context of a suppression motion any more than they intended Rule 4(a) complaints to be so treated, or they would have stated so explicitly in the rule.

It is true, however, that appellate courts have found it necessary to fashion an exclusionary rule under their supervisory powers in certain instances. For example, confessions elicited during unreasonable delay in bringing suspects before the magistrate—such delay proscribed in Rule 5(a) also—are excluded from evidence. *McNabb* v. *United States,* 318 U.S. 332 (1943). This result is designed to protect against coerced abrogation of the Fifth Amendment right against self-incrimination, a primary purpose of the 5(a) requirement itself, and to deter police misconduct in that regard. The *McNabb* result, however, was not designed to punish unrelated police misconduct. *United States* v. *Mitchell,* 322 U.S. 65 (1944); *United States* v. *Carignan,* 342 U.S. 36 (1951); *United States* v. *Russian,* 192 F. Supp. 183 (D. Conn. 1961).

Similarly, this court has decided that evidence seized incident to an arrest made upon a warrant must be suppressed if it is shown that the affiant intentionally misrepresented certain facts in order to deceive the warrant-issuing magistrate, whether or not those facts were material to the warrant showing of probable cause. *United States* v. *Carmichael,* 489 F.2d 983 (7th Cir. 1973). We reached this result because of our belief that intentional false swearing by law enforcement officers to bolster a probable cause showing presents such an egregious threat to Fourth Amendment rights that it deserves the strongest deterrent available.

Finally, while we affirm the decision reached by the district court, we are not unresponsive to the defendant's charge that this result strips Rule 5(a) of some meaning. We remind federal law enforcers that the rule was amended in 1972 in spite of objections which we understand were made by the Justice Department that the amendment would create an additional and unnecessary administrative burden upon the criminal justice system. If filing 5(a) complaints which show probable cause is in fact burdensome, it must nevertheless be done, and performed with both care and accuracy. The impeachment value of a carelessly drafted 5(a) complaint and the immediate possibility of having a suspect discharged from custody on the basis of such a complaint will encourage meaningful adherence to Rule 5(a) in the future. We think it unwise to read in the exclusionary rule as an additional incentive to promote compliance with Rule 5(a)'s complaint requirement without some affirmative language to that effect in the Rule itself.

The judgment appealed from is AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604
(Argued January 26, 1978)
May 23, 1978.

Before

Hon. Thomas E. Fairchild, Chief Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 77-1954 vs.

JOSE L. FERNANDEZ-GUZMAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-Cr-829
FRANK J. MCGARR, *Judge.*

ORDER

The defendant's primary contention on this appeal—that when determining the validity of a warrantless arrest on a motion to suppress evidence, the trial court is limited to looking only at the complaints filed in accordance with Fed. R. Crim. P. 5(a)—is addressed and rejected in an opinion filed together with this order. However, the defendant makes other arguments which we decide here. He argues (1) that the 5(a) complaints do not show probable cause; (2) that if those complaints are sufficient on their face, inaccuracies within them invalidate them; (3) that if holding an evidentiary hearing on the suppression motion was not error, the evidence adduced at it was insufficient to support probable cause to arrest; and (4) that the evidence at trial was not sufficient to convict.

Although we agree that the 5(a) complaints are deficient on their face, the defendant was not entitled to have his suppression motion granted on that basis because of our holding in this case that the validity of the arrest and the seizure thereto are not necessarily to be determined from the face of the complaints. We conclude that the suppression hearing produced sufficient evidence to support the district court's finding of probable cause at the time of arrest. Finally, we find the conviction to be supported by sufficient evidence at trial. Thus, we affirm the judgment appealed from.

I. ADEQUACY OF THE 5(A) COMPLAINTS

Our inquiry into the validity of the arrest in this case begins naturally with the 5(a) complaints since if they do demonstrate probable cause, as the government appears to argue for the first time on appeal, then we might not have to reach the issue of whether the government was entitled to show probable cause by evidence outside their four corners. However, it is clear to us that the complaints fail to make a minimally adequate showing.

The government contends that even though the complaints fail the two-pronged *Aquilar* test, being devoid of statements on either the trustworthiness of the confidential informant or the manner in which the informant obtained the information revealed to the officers, they contain facts acquired independently which corroborate and support the confidential tips, and thus show probable cause. We do not take issue with the government's understanding of the

law here, but we disagree with its characterization of the facts in the complaints as describing "suspicious" activities tending to corroborate the tip or otherwise indicating criminal behavior on the part of this defendant.

The confidential advice revealed in the complaints was that a heroin shipment was expected on July 12, that it had arrived on that date and was at 2724 South Keeler, and that Fernandez would be involved in its delivery. The complaint further describes the following pre-arrest activities: At 9:30 PM on July 12, Rodriguez (Fernandez' co-defendant who was subsequently acquitted) carried a brown paper bag with a red mark on it out of 2724 South Keeler, and drove it to an apartment at 3501 West Pierce, returning a little while later to the Keeler address without the bag. Near midnight, both Fernandez and Rodriguez arrived at the Pierce apartment, which no one had entered or exited in the meantime. They exited the apartment shortly after entering, with Fernandez carrying what appeared to be the same paper bag that Rodriguez had brought there earlier. These observed activities--driving to and from an apartment, carrying a brown paper bag into or out of a residence—"contain no suggestion of criminal conduct when taken by themselves—and they are not endowed with an aura of suspicion by virtue of the informer's tip." *Spinelli* v. *United States,* 393 U.S. 410, 418 (1969). Although *Spinelli* concerned a search rather than an arrest warrant, that difference is immaterial on the issue of whether an affidavit judged inadequate under *Aquilar* could nevertheless be saved by virtue of allegations describing rather innocent conduct observed by police independent of and not inconsistent with an unsupported tip of criminal behavior. The 5(a) complaints in this case are not themselves a sufficient basis for a finding of probable cause to arrest.

II. INACCURACIES IN THE COMPLAINTS

Since the 5(a) complaints are deficient on their face, there is no need to consider whether some of the statements contained in them are inaccurate or false. Whatever inaccuracies there are do not substantiate bad faith on the part of the affiants sufficient to trigger use of the exclusionary rule. The most that has been demonstrated here is carelessness not deliberate false swearing.[1]

However, as recognized by this court in *United States* v. *Carmichael,* 489 F.2d 983, 990 (7th Cir. 1973), as well as by the district judge and the defendant himself in this case, inaccurate complaints or affidavits do serve an important function for impeachment purposes when the affiants testify differently at a later hearing. In this case, that was the only function of the 5(a) complaints.

III. SUFFICIENCY OF EVIDENCE TO SUPPORT ARREST

The defendant maintains that even if an evidentiary hearing were proper on his motion to suppress, the evidence adduced at it was insufficient to warrant a reasonable belief at the time of arrest that he was committing a crime. He especially claims that the informant's reliability was not demonstrated and that the independent observations made by the arresting officers do not support an in-

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[1] In *United States* v. *Carmichael,* 489 F. 2d 983 (7th Cir. 1973), this court stated that misrepresentations in a pre-arrest affidavit made deliberately to deceive the warrant-issuing magistrate require use of the exclusionary rule whether or not the inaccuracies are material to the showing of probable cause. We also said that if the errors were recklessly, but not intentionally, made, then the exclusionary rule applies only if those errors were material to the probable cause showing. However, in no event did we deem it necessary to exclude evidence based on merely negligent errors in the arrest warrant.

ference of criminal activity. In addition, Fernandez seeks to cast doubt on the officers' own subjective belief in probable cause to arrest, demonstrated by their dependence on a marked Chicago police car to stop the car he was driving, allegedly for a traffic violation, in order that it could be searched before the drug arrest was made.

The latter contention can be disposed of briefly. Enlisting the aid of a marked local police car to stop the defendant's moving vehicle does not unequivocally establish that the arresting officers did not reasonably believe at the time of the arrest that Fernandez was committing an offense. *See Stephens* v. *Lindsey*, 304 F. Supp. 203 (S.D. Ga. 1969), where the arresting officer's affirmative answer to the question, "In other words, you just had suspicion, is that right?" during a suppression hearing in no way cast doubt on his reasonable belief at the time he made the arrest that the defendant was committing a crime.

Turning next to the review of the district court's conclusion that the evidence heard on the motion to suppress supports probable cause to arrest, we remind ourselves that our function is a limited one: to determine whether the district court could reasonably decide that the facts known to the officers at the time of arrest, as testified to at the suppression hearing, constituted probable cause to believe that Fernandez was committing an offense.

First, we determine that the evidence supports the district courts' finding that the officers could reasonably rely on the informant. Special Agent Irwin of the Drug Enforcement Administration testified that he had received information from this informant at least fifty times in the two years they had known each other. While that past information led to no arrests or narcotics seizures, whenever Irwin was able to check it, he found it to be accurate. In particular, much of the information bearing some rela-

tionship to this case was independently verified by investigation or surveillance. To aid comparison, we set out the informant's advice alongside the independent verification:

	From Informant	*Verification*
1.	Rodriguez had several vehicles.	Five vehicles were registered to Rodriguez at 2724 South Keeler. He was observed driving all five plus one other during the month prior to July 12.
2.	One of Rodriguez' cars was used by Mancillas.	Mancillas was seen several times driving a 1975 burgundy Ford Elite registered to Rodriguez.
3.	Mancillas was trafficking in drugs in Cleveland.	In March, 1976, the same 1975 Ford Elite driven by Mancillas was connected with the narcotics arrest of a man named Jennings, in Cleveland. Jennings said he was to participate in a heroin delivery in Cleveland with Mancillas and others. At the same time, the car was seen in the parking lot of a Cleveland Holiday Inn at which a man named Mancillas was registered. In addition, an individual who was arrested for delivering heroin under surveillance of the Cleveland Police Department had on him several telephone numbers connecting him with Mancillas.
4.	Mancillas was trafficking in drugs in Detroit.	Mancillas travelled to Detroit several times before and after July 12.
5.	The Tangiers Hotel was a meeting place of Mancillas and Rodriguez.	On several occasions Mancillas and Rodriguez were both registered at the Tangiers Hotel at the same time under different names.

While none of the corroborated information set out above concerns Fernandez, we believe it does establish the past reliability of Irwin's informant. Because of that reliability, Irwin was not unjustified in considering the information received about the defendant and the July 12 drug deal to be reasonably trustworthy and part of the totality of facts and circumstances surrounding his arrest. That information revealed by Irwin's informant was the following: Fernandez was trafficking in drugs for Mancillas; Fernandez used to frequent the Maribou, a club owned by Mancillas, and had displayed a large amount of money there just before July 12; a large quantity of heroin was in Chicago for Mancillas on July 12 and Rodriguez was to be active in its distribution. Although there was no evidence on how the informant came to know this information, later corroboration implies it must have been obtained through reliable means.

With the confidential advice as background, Irwin and Dailey became aware of additional facts and circumstances through surveillance conducted by themselves and other agents [2] during the month prior to and on the night of July 12. Prior to that date, Fernandez was seen frequenting Rodriguez's South Keeler residence, and spending the night several times. Then on July 12, the following activities were observed: Fernandez came out of the Keeler house about 9:00 PM, looked up and down the street, walked over to and drove away a black Cadillac. After circling the block a few times, he drove to the alley at the rear of the house he had exited, where Rodriguez, carrying

[2] We deem it irrelevant that Irwin and Dailey did not make all the observations themselves. They were entitled to rely on reports describing the direct observations of other agents. Thus, that information was properly considered to be part of the total known to the arresting officers at the time of arrest.

a grocery-type brown paper bag with red writing on it, also came out. Rodriguez looked up and down before entering the Cadillac. The two men proceeded, again circuitously, to a corner of West Pierce and Homan where they parked and got out of the car, Rodriguez still with the bag. They looked up and down the street before entering an apartment at 3501 West Pierce. About a half hour later, they both came out without the bag and returned to 2724 South Keeler. Around 11:30 PM, both men again exited the Keeler address. Fernandez then drove a red Mustang and Rodriguez, a 1975 burgundy Ford Elite, both cars registered to Rodriguez, to the same apartment on West Pierce. Neither carried anything. No one had entered or exited the building since they had left it earlier. After being in the apartment about a half hour, Fernandez came out the same door he had entered, stopped halfway to the parked Mustang and looked around. He was at this time carrying a brown bag which looked the same as the one Rodriguez had brought there earlier. He then entered the car. Rodriguez immediately thereafter came from the backyard at 3501 West Pierce, also stopping on the way to his car to look around. He was carrying a large metal box which Irwin recognized from his experience in drug enforcement to be a scale box, commonly used in the weighing of narcotics. Rodriguez then got into the Ford Elite. The men drove away in different directions. (Soon after this they were stopped and arrested. The bag, found to contain heroin, was seized from Fernandez, and the scale box was seized from Rodriguez.)

It appears clear to us that the totality of the evidence, including the tip about a drug deal involving Rodriguez on July 12 received from a reliable informant, the caution displayed by both men on the evening of July 12 when they were transporting a bag—looking up and down streets be-

fore entering and after exiting their car and taking indirect routes to their destinations—and the presence of a scale box consistent with drug trafficking, describes facts and circumstances known by the officers upon which it was reasonable to base a belief at the time of arrest that Fernandez was committing a crime, the conclusion reached by the district court. Thus, although the arrest was made without issuance of a prior warrant, it was not "unwarranted." The search and seizure, being incidental to a constitutional arrest, were also valid. Denial of the motion to suppress was, therefore, not error.

IV. SUFFICIENCY OF EVIDENCE TO SUPPORT CONVICTION

The final issue raised by the defendant is whether the government presented any evidence from which could be reasonably inferred that he knew the contents of the bag he possessed and that he intended to distribute the heroin. The defendant contends that his conviction of possession with intent to deliver heroin must be reversed for lack of proof on all the elements necessary to make out the offense. We find, however, that the trial judge, as trier of fact, could infer from the evidence, viewed in the light most favorable to the government, that the defendant knew of and intended to distribute the heroin beyond a reasonable doubt.

Proof of the elements in issue here, being states of mind, ordinarily rests on circumstantial evidence, including the nature and amount of the contraband. *United States* v. *Moser,* 509 F.2d 1089, 1092 (7th Cir. 1975); *United States* v. *Mendell,* 447 F.2d 639, 642 (7th Cir. 1971), *cert. denied* 404 U.S. 991 (1971).

The evidence at trial established that Fernandez had in his possession at the time of arrest a bag containing ap-

proximately two kilograms or five pounds of a heroin derivative, with a wholesale value of about $60,000 and a projected street value after dilution of two million dollars. It is indeed difficult to imagine that he would come to possess such a valuable commodity without knowing what it was.[3] In addition to the facts of possession, quantity and value of the heroin, the cautious behavior exhibited by the defendant when he exited the West Pierce apartment with the bag contributes to the inference of knowledge.

United States v. *Pruett,* 551 F.2d 1365 (5th Cir. 1977), a case relied upon by the defendant, is easily distinguishable on the facts. There, a package containing cocaine[4] was found at Pruett's residence. It had been picked up by his wife at her post office box. She testified that because it was incorrectly addressed (to "Miss" Pruett), her husband told her it would be illegal to open it. She claimed she then taped the wrapper where she had already begun opening it. There was no evidence that the mailed package from an unknown source in Bogota, Columbia (there was no return name or address marked on the package) had been opened by either spouse and thus that Pruett could have discovered its contents. Reversing his conviction, the Court of Appeals concluded that knowledge of the contents of the package under these circumstances could not be inferred from Pruett's physical possession of the package.

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[3] Of course, even if the defendant had purposely chosen to remain ignorant of the bag's contents so that he could truthfully assert that ignorance should he be caught with it, he would still be chargeable with knowledge. *United States* v. *Moser,* 509 F.2d 1089, 1092-93 (7th Cir. 1975).

[4] Actually, the cocaine originally in the package had been removed by a DEA agent prior to its "controlled delivery."

By contrast, the defendant in the instant case came to possess the bag of heroin in a vastly different manner. Instead of its being thrust upon him through postal delivery outside his control, Fernandez himself drove to the apartment where he acquired it. It was not a sealed package, but an open bag, and it could hardly be maintained that its "source" was unknown since the immediate source was obviously the West Pierce apartment which he visited twice in the same evening. The *Pruett* case is of no help to Fernandez.

Although there was no direct evidence on the element of knowledge other than its denial by the defendant when he was arrested (at which time he also denied knowing whose car he was driving), that element is adequately supported by the circumstantial evidence presented at trial. Its finding by the trial court will not be disturbed on appeal.

Finally, we conclude that the finding of intent to distribute heroin is also sufficiently supported by the evidence. The amount and value of the heroin seizure is relevant to the element of intent to distribute as well as knowledge. *United States* v. *Gutierrez-Espinoza,* 516 F.2d 249, 250 (9th Cir. 1975); *United States* v. *Welebir,* 498 F.2d 346, 350-51 (4th Cir. 1974); *United States* v. *Kelly,* 527 F.2d 961, 965 (9th Cir. 1976); *United States* v. *Mather,* 465 F.2d 1035, 1038 (5th Cir. 1972), *cert. denied* 409 U.S. 1085 (1972); *United States* v. *Ortiz,* 445 F.2d 1100, 1104 (10th Cir. 1971), *cert. denied* 404 U.S. 993 (1971); *United States* v. *Wilkerson,* 478 F.2d 813, 815 (8th Cir. 1973).

In addition, there was evidence that the degree of purity of the heroin seized from Fernandez would have killed the average street addict, and that diluted to average street dosage, 80,000 dose units would have been produced. Even

if there was evidence of heroin addiction by the defendant, it would be highly unreasonable to infer that that amount and purity of heroin was for his own use. The fact that the heroin was not already broken down into smaller and more easily distributable packets does not negate the reasonableness of inferring intent to distribute, *United States* v. *Ramirez-Rodriguez,* 552 F.2d 883 (9th Cir. 1977), especially in light of the scale box which Rodriguez carried from the same apartment and at about the same time that Fernandez exited with the bag of heroin. *See United States* v. *DiNovo,* 523 F.2d 197, 202 (7th Cir. 1975), *cert. denied* 423 U.S. 1016 (1975).

Thus, taking the circumstantial evidence in its entirety, we conclude that it amply supports finding defendant guilty beyond a reasonable doubt of the offense charged.

APPENDIX D

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604
June 30, 1978.
Before
Hon. Thomas E. Fairchild, Chief Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 77-1954 vs.

JOSE L. FERNANDEZ-GUZMAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-Cr-829
FRANK J. MCGARR, *Judge.*

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by counsel for the defendant-appellant, with suggestion for rehearing *in banc,* no judge in regular active service having requested a vote thereon, and all of the judges of the original panel having voted to deny a rehearing,

Accordingly, IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.